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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

Master File No. M07-1827 SI

MDL No. 1827

This Document Relates to:

ALL DIRECT PURCHASER CLASS ACTIONS

**DIRECT PURCHASER CLASS
PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR AN ORDER APPROVING
SECOND DISTRIBUTION OF
SETTLEMENT FUNDS**

Date: January 17, 2014
Time: 9:00 a.m.
Courtroom: 10, 19th Floor

The Honorable Susan Illston

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD, AND TO ALL DIRECT PURCHASER CLASS MEMBERS:

4 **PLEASE TAKE NOTICE** that at 9:00 a.m. on January 17, 2014, or at such time subject
5 to the Court's calendar,¹ Direct Purchaser Class Plaintiffs will, and hereby do, move before the
6 Honorable Susan Illston, United States District Judge, at the United States Courthouse,
7 450 Golden Gate Avenue, Courtroom 10, San Francisco, California, for an order approving the
8 second distribution of settlement funds to the Direct Purchaser Class Members. This motion is
9 based upon the supporting Memorandum of Points and Authorities filed concurrently with this
10 Notice; Plaintiffs' November 22, 2013 Status Report (Dkt. No. 8791); the Declaration of Robin
11 Niemiec in Support of this Motion, filed concurrently with this Notice; the records, pleadings, and
12 papers filed in this action; and upon such argument as may be presented to the Court at the
13 hearing on this motion.

¹ Direct Purchaser Class Plaintiffs respectfully submit that this Motion can be determined without a hearing. If no opposition or response is filed, they respectfully request that the Court enter an Order on the Motion after the 14-day period to file a response expires.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Direct Purchaser Class Plaintiffs (“Plaintiffs”) move the Court for an order authorizing a second distribution of settlement funds to the Direct Purchaser Class.

Previously, on July 12, 2013, the Court ordered a distribution of \$258,637,975.14 from the Settlement Fund created for Direct Purchaser Class Members (the “Initial Distribution”). (Dkt. No. 8302 ¶ 8.) The Court’s Order further provided,

After the Initial Distribution has been completed, and 120 days has passed, Co-Lead Class Counsel shall update the Court regarding the status of disputed and late claims, the total of checks sent to claimants but not negotiated, and the remaining balance in the Settlement Fund. After updating the Court regarding the Initial Distribution, Co-Lead Class Counsel shall seek approval from the Court for distribution of all remaining amounts in the Settlement Fund according to the same *pro rata* formula used to calculate payments made as part of the Initial Distribution.

(*Id.* ¶ 10.)

On November 22, 2013, pursuant to the Court’s July 12 Order, Plaintiffs provided a status report regarding the Initial Distribution. *See generally* Direct Purchaser Class Pls.’ Status Report RE Initial Distribution of Settlement Funds (Dkt. No. 8791). There, Plaintiffs reported that \$58,694,382.06 remained in the Settlement Fund as of October 30, 2013. *Id.* at 3:17. Additionally, Plaintiffs reported that, of the approximately \$259 million distributed as part of the Initial Distribution, \$94,851.64 remained from 154 checks that were uncashed, undeliverable, or returned (“Uncashed Funds”). *Id.* at 3:19. Finally, Plaintiffs reported that three claimants – Propeller, Inc.; DuPont; and OfficeMax – recently submitted affidavits seeking payment of their late-filed or disputed claims.

Plaintiffs respectfully move the Court for an order authorizing distribution of the remaining settlement proceeds (*i.e.*, the Settlement Fund and Uncashed Funds) to bring this case to a close (“Second Distribution”).² As part of that order, Plaintiffs request that the Court

² Class Counsel is in the process of closing out the Litigation Fund, which the Court authorized to cover litigation-related fees and costs. Class Counsel must account for, among other things, unpaid fees and costs owed under previous orders of the Court but not yet paid. Once that process is complete, Class Counsel will return to the Class any funds remaining in the Litigation

Footnote continued on next page

1 determine whether Propeller's, DuPont's, and OfficeMax's claims should be paid and authorize
 2 an additional payment of \$15,000 to Claims Administrator Rust Consulting, Inc. ("Rust") for
 3 claims administration costs associated with the Second Distribution.

4 **II. BACKGROUND**

5 Plaintiffs reported the statistics of the Initial Distribution in their November 22, 2013
 6 Status Report (Dkt. No. 8791) and do not recite those facts again here, but incorporate them by
 7 reference. Below, Plaintiffs offer background on claimants seeking payment of their late-filed or
 8 disputed claims.

9 **A. Propeller, Inc. and DuPont Request Payment of Late-Filed Claims.**

10 After the Court-imposed deadline for filing declarations supporting the payment of late-
 11 filed and disputed claims, and after the Court issued its order regarding such claims, two
 12 additional claimants – Propeller, Inc. and DuPont – contacted Rust requesting payment of their
 13 late-filed claims. Decl. of Robin Niemiec in Support of Motion for Second Distribution
 14 ("Niemiec 2d Dist. Decl.") ¶ 13. Both Propeller and DuPont have submitted affidavits explaining
 15 why they contend their late-filed claims should be paid. *Id.*, Exs. A-B. The total estimated award
 16 value for Propeller's and DuPont's claims is \$199,343.52.³ *Id.* ¶ 14.

17 Propeller explains that, after corresponding with Rust regarding making a claim and
 18 learning that Rust had data on Propeller's purchases, "[n]othing led [Propeller] to believe that any
 19 further action needed to be taken in order to be paid." Niemiec 2d Dist. Decl., Ex. A at 1.
 20 Propeller states that it "should have been given better notice" and "respectfully request[s] that [it]
 21 be included on the next distribution." *Id.*

22 DuPont states that it only learned of its "qualifying direct purchases in late 2012 during its
 23 preparation of its LCD indirect claim." Niemiec 2d Dist. Decl., Ex. B. DuPont states that it
 24 "submitted its direct purchaser claim as soon as it could after an expedited effort to locate

25 *Footnote continued from previous page*

26 Fund, depositing into the Settlement Fund any such funds. Such a deposit may result in increased
 27 award amounts to claimants receiving checks as part of the Second Distribution.

28 ³ This amount assumes that both of these late-filed claims will be paid, along with OfficeMax's
 29 adjusted claim.

1 relevant information and records.” *Id.*

2 **B. OfficeMax Seeks Adjustment of its Disputed Claim.**

3 Last week, Class Counsel was contacted by OfficeMax, which disputed Rust’s adjustment
 4 of its claim. In letters dated August 24, 2012 and February 21, 2013, Rust informed OfficeMax
 5 that it considered only approximately \$3.9 million of OfficeMax’s approximately \$183 million
 6 claim as eligible. Niemiec 2d Dist. Decl. ¶ 15. Rust’s determination was made based on its
 7 review of OfficeMax’s purchases as reflected in Defendants’ data. OfficeMax did not file an
 8 affidavit in response to the Court’s July 12 Order, which set forth a process for disputed claims.

9 After OfficeMax submitted additional documentation on November 21, Rust reevaluated
 10 OfficeMax’s claim, determining that it made approximately \$183,440,899 in eligible purchases.
 11 Niemiec 2d Dist. Decl. ¶ 15. OfficeMax explains that it did not provide the information
 12 previously because it was “told by the Claims Administrator that nothing could be done to change
 13 their adjustment” and that it “never received the Distribution Order, nor was [it] aware of the 30
 14 day time period to pursue late or disputed claims.” *Id.*, Ex. C ¶¶ 7-8. The total estimated award
 15 value for OfficeMax’s adjusted claim is \$1,650,858.52.⁴ *Id.* ¶ 15.

16 **III. ARGUMENT**

17 As Plaintiffs stated in last week’s Status Report, there has been robust participation by
 18 Class Members in the claims process and the Initial Distribution was accomplished pursuant to
 19 the Court’s July 12 Distribution Order, with checks issued to 2,390 class members. Because
 20 some of the settlement funds were held back from the Initial Distribution to account for certain
 21 contingencies, an additional distribution is necessary to disburse the remaining funds to Class
 22 Members and bring this matter to a close. Thus, Plaintiffs respectfully request that the Court
 23 enter an Order approving the distribution of all remaining amounts in the Settlement Fund and the
 24 \$94,851.64 in Uncashed Funds.

25 Similar to the Initial Distribution, within the Panel and Product Classes, claimants are to
 26 be paid on a *pro rata* basis for their recognized loss. For the Panel Class, the recognized loss is

27
 28 ⁴ This amount assumes that OfficeMax’s claim will be paid, along with Propeller’s and DuPont’s.

1 100% of the eligible purchases of stand-alone panels. For the Product Class, the recognized loss
 2 is based on percentages of panel value in a finished product which are: 75% for monitors. 15%
 3 for notebook computers, 47% for televisions, and 7.6% for other products. The Product Class'
 4 recognized loss dollar is calculated using these percentages. Niemiec 2d Dist. Decl. ¶ 12.

5 To facilitate the expeditious exhaustion of the Settlement Fund, Plaintiffs propose that the
 6 Court require that all checks bear the notation "Non-Negotiable after 28 Days" and that no check
 7 may be negotiated after 45 days. Because the period to negotiate checks is shortened, Rust will
 8 send checks to claimants by overnight courier. Notably, each of the claimants receiving a second
 9 distribution check cashed their checks from the Initial Distribution. Niemiec 2d Dist. Decl. ¶ 20.
 10 Plaintiffs therefore anticipate that a very high percentage of the checks distributed as part of the
 11 second distribution will be cashed.

12 **A. The Court Has Discretion to Pay Propeller's and DuPont's Late-Filed Claims**
 13 **and OfficeMax's Disputed Claim.**

14 Plaintiffs recommend payment of Propeller's and DuPont's late-filed claims and
 15 OfficeMax's request for an adjustment, which have a combined estimated award value of
 16 \$1,850,202.04. If these claims are paid, this would reduce the *pro rata* distribution to Panel
 17 Class members from \$.0169 per recognized loss dollar to \$.0168 per recognized loss dollar.
 18 Niemiec 2d Dist. Decl. ¶¶ 12, 16. For the Product Class, the *pro rata* distribution would be
 19 reduced from \$.0079 per recognized loss dollar to \$.0075 per recognized loss dollar. *Id.*

20 The Court has discretion to order payment of such tardy claims. *See In re Gypsum*
 21 *Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977) (discussing district court's discretion
 22 regarding late claims). Plaintiffs respectfully request that the Court review the affidavits and
 23 decide whether these three claims should be paid.

24 **B. Plaintiffs Request an Additional \$15,000 for Claims Administration Expenses.**

25 Rust has estimated that "an additional \$15,000 of fees and expenses" will be incurred to
 26 implement the second distribution. Niemiec 2d Dist. Decl. ¶ 6. Among other things, this amount
 27 will pay for "preparing for and implementing the second distribution, responding to claimant
 28 inquiries and activities associated with closing the website, hotline and distribution account." *Id.*

1 Plaintiffs recommend that the Court authorize payment of these additional expenses.

2 **C. In the Event Funds Remain After the Second Distribution, Plaintiffs Will File**
a Status Report and Recommend a Disposition.

3 If all checks for the Second Distribution are delivered and cashed, the Court's Order on
4 the current motion should exhaust the Settlement Fund. As noted above, all claimants receiving a
5 second check cashed the check they received as part of the Initial Distribution. Niemiec 2d Dist.
6 Decl. ¶ 20.

7 In the event that not all checks are cashed after the deadline to negotiate checks has
8 passed, within 15 days of that deadline, Plaintiffs will file a status report apprising the Court of
9 the settlement funds remaining and recommend whether a *cy pres* distribution to one or more
10 charitable organizations is warranted. *Cy pres* distributions are permissible for “unclaimed . . .
11 portions of a class-action settlement.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).
12 Such a distribution would be to an organization that “bears a substantial nexus to the interests of
13 the class members.” *Id.* at 821.

14 **CONCLUSION**

15 For the foregoing reasons, Plaintiffs respectfully request an order permitting a Second
16 Distribution of the Settlement Fund. Direct Purchaser Class Plaintiffs respectfully submit that
17 this Motion can be determined without a hearing. If no opposition or response is filed, they
18 respectfully request that the Court enter an Order on the Motion after the 14-day period to file a
19 response expires.

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Respectfully submitted,

Dated: November 27, 2013 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

By: /s/ Marc A. Pilotin
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ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), the filer of this document attests that concurrence in the filing of this document has been obtained from the other signatory.

Dated: November 27, 2013

By: _____ /s/ *Marc A. Pilotin*
Marc A. Pilotin